TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Missouri Supreme Court Rules

Other Authorities

STATEMENT OF FACTS

The underlying cause of action is for the wrongful death of Hazel I. Trimble. Defendants are BJC Health System ("BJC"), Missouri Baptist Medical Center ("MBMC"), and John Hess M.D. ("Hess").[1] On February 26, 2003, Plaintiffs (the "Trimbles"), filed their Petition for Writ of Mandamus or Prohibition in this Court as Relators in Cause No. SC85132, seeking a Writ of Prohibition and/or Mandamus directing Respondent to vacate her Order of separate trials and of transfer dated November 27, 2002, and to reinstate the claim against MBMC which was transferred to the Twenty-First Judicial Circuit in St. Louis County. § 355.176.4. Defendants in the cause of action below, Relators herein, BJC and MBMC, now seek an extraordinary writ prohibiting Respondent or the current presiding judge of the circuit from taking any further action except to transfer the case to St. Louis County.

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[1] On March 3, 2003, this Court received Defendant Hess's Petition for extraordinary writ, Cause No. SC85138. On July 31, 2002, Respondent correctly ruled that Hess had waived the issue of improper venue. (Exhibit12 to Relators' BJC and MBMC's Petition for Writ). The Court of Appeals for the Eastern District of Missouri denied Hess's previous petition for extraordinary writ. (Exhibit "A" as attached to Respondent's Suggestions in Opposition, Cause No. SC85135, hereinafter "Suggestions in Opposition"). Venue facts as to Hess, an individual Defendant, are irrelevant to the determination of venue under § 355.176.4, RSMo. 1996.

In this case, Plaintiffs allege that Relators herein, BJC and MBMC, negligently caused the death of Hazel Trimble. (Petition, Exhibits 1 and 7).[2] Plaintiffs allege that BJC holds itself out as an "integrated healthcare delivery system" that "employs more than 25,000 people" who "work to provide exceptional health care service" at BJC's "member" institutions, including MBMC. (Exhibit 1 at ¶ 3; Exhibit 7 at ¶ 3; Exhibit 17). Plaintiffs also allege these Defendants are jointly liable for Mrs. Trimble's death (Exhibit 1 at ¶ 7; Exhibit 7 at ¶ 8), and Respondent found such allegations sufficient to state a claim. (Exhibit 14 at 3). Relators BJC and MBMC do not dispute that the Trimbles have properly alleged BJC and MBMC are joint tortfeasors. (Relators' Suggestions in Support at 18, 19, 21-22).

Both Defendants BJC and MBMC are nonprofit corporations. The nonprofit corporate venue statute, § 355.176.4 RSMo., states in pertinent part:

> Suits against a nonprofit corporation shall be commenced only in one of the following locations:
>
> (1) The county in which the nonprofit corporation maintains its principal place of business;
>
> (2) The county where the cause of action accrued;
>
> (3) The county where the office of the registered agent for the nonprofit

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[2] Unless otherwise noted, exhibits cited herein are those as attached to Relators' petition for extraordinary writ.

corporation is maintained.

§ 355.176.4, RSMo. 1996.

Plaintiffs have alleged that venue is proper for this action in the City of St. Louis under § 355.176.4 because defendant BJC has its principal place of business there. (Exhibit 1 at ¶ 3; Exhibit 7 at ¶ 3; Exhibit 5 at ¶ 8; Exhibit 6 at ¶ 6). Although the cause of action accrued at MBMC's facilities, which are located in St. Louis County (Exhibit 7 at ¶ 7), and MBMC and BJC have a registered agent in St. Louis County (Exhibit 1, *see* style of case), the principal place of business of BJC, in fact, is in the City of St. Louis and this fact has never been disputed (Exhibit 14 at 4, n.2). Beyond question, if the present case were filed against BJC, whether as the sole defendant or as a co-defendant with an individual or a for-profit corporation, venue would be proper in the City of St. Louis under the applicable "special" venue statute. *See* § 355.176.4(1), RSMo.; *State ex rel. SSM Healthcare St. Louis v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002).

Defendants MBMC and BJC argued before Respondent that venue was improper because § 355.176.4 could not be reconciled as to each Defendant individually. (Exhibit 3 at ¶ 8; Exhibit 4 at ¶ 6; Exhibit 14 at 3). In other words, the Defendants effectively asked Respondent to resolve the issue of venue as if two cases were before her, one against BJC and one against MBMC.

Respondent, acknowledging considerable confusion regarding the proper interpretation of the statute, decided that venue was proper as to MBMC in St. Louis County. (Exhibit 14 at 3-4). BJC's motion to transfer, however, was denied since it was

undisputed that its principal place of business is in St. Louis City. (Exhibit 14 at 4, n. 2). Under § 355.176.4, this fact alone compelled denial of BJC's motion to transfer. Both sides to the dispute sought relief in the Court of Appeals, which was denied. [3] (Exhibits 15 and 16).

Thus, the issue before this Court is squarely presented: when there are two nonprofit corporations properly alleged to be jointly liable for a single harm and venue is unquestionably proper as to one defendant (BJC), is venue proper as to the other jointly liable defendant (MBMC)? Because this Court should answer this question affirmatively,

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[3] Additional facts are set forth here, not because they are directly pertinent to this writ, but to avoid confusion created by the record. Respondent initially found that all Defendants, including BJC and MBMC, had waived objection to venue by failing to timely raise the issue by motion. (Exhibit 12 at 2). After Defendants BJC and MBMC sought a writ in the Court of Appeals, and Plaintiffs herein filed their Suggestions in Opposition thereto, the Eastern District ordered Respondent to consider the merits of Defendants' motions. (Exhibit 13 at 2). Once Respondent issued her order of November 27, 2002, the Court of Appeals denied Defendants BJC and MBMC's petition for an extraordinary writ. (Suggestions in Opposition, Exhibit "B"). Defendants and Plaintiffs then sought relief from the Court of Appeals over the Respondent's November 27 Order and each was denied. (Exhibits 15 and 16). Thus, the issue of waiver is not before the Court here..

Relators' Petition for extraordinary writ should be expeditiously denied.

ARGUMENT

Standard of Review

Writs of Mandamus are only issued to compel performance of a clear, unequivocal, preexisting and specific right. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. Banc 1996). Likewise, prohibition is discretionary and there is no right to have the writ issued. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001). In every case "judicial discretion must be reckoned with and applied with judicial self-restraint." *State ex rel. Fielder v. Kirkwood*, 138 S.W.2d 1009, 1010 (Mo. banc 1940).

I. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo., VENUE IS PROPER AS TO JOINT TORTFEASOR BJC IN THAT IT IS UNDISPUTED THAT THE PRINCIPAL PLACE OF BUSINESS OF BJC WAS AND IS IN THE CITY OF ST. LOUIS AND RESPONDENT, THEREFORE, HAD NO MINISTERIAL DUTY UNDER SECTION 476.410, RSMo., AND RULE 51.045 TO TRANSFER THE CASE TO ST. LOUIS COUNTY.

A. Respondent did not err in refusing to transfer the case against BJC to St. Louis County under § 355.176.4, RSMo., and *SSM v. Neill*.

1. Venue as to jointly liable BJC is venue as to jointly liable MBMC.

Relators BJC and MBMC maintain that, when sued together, they can "only" be sued in St. Louis County on the facts in this case under Mo. Rev. Stat. § 355.176.4 (1996) and *State ex rel. SSM Healthcare St. Louis v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002). The Relators' analysis, however, characterizing the facts of *SSM v. Neill* as "essentially identical to the present case," ignores the salient fact that *SSM v. Neill* did not address the issue presented here by the presence of an additional, properly joined, jointly liable, nonprofit corporate co-defendant with its principal place of business in the City of St. Louis. Contrary to Relators' assertions, the "narrow issue presented for review" to this Court in *SSM v. Neill* was "whether the special nonprofit corporation statute, section 355.176.4, or the general venue statute, section 508.010 governs venue when a nonprofit corporate defendant is joined with an individual or corporate for-profit defendant." *SSM v. Neill*, 78 S.W.3d at 142 (emphasis added). This Court held that "section 355.176.4 limits permissible venues for suits against nonprofit corporations [plural] only to one of the three locations designated in the statute even when other defendants, including individuals, are also sued." *SSM v. Neill*, 78 S.W.3d at 145 (brackets to point out pluralization of "corporations" and emphasis added). The holding of this Court in *SSM v. Neill* under the circumstances of the present case does not provide the joint tortfeasor MBMC with a "venue trump card" as asserted by Relators. (Relators' Suggestions in Support at 13; Relators' Brief at 24).

Relators' argument also ignores longstanding requirements regarding properly joined, joint tortfeasors and venue. This Court has held that "[t]he question of proper venue must be resolved by the statutes relating to venue **and** by the rules relating to the propriety of joinder of defendants, for the question of venue is contingent upon proper joinder of parties defendant." *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 825 (Mo. banc 1979) (emphasis added).

Common or joint liability "is the touchstone for the determination of whether venue may be predicated upon the residence of a co-defendant." *State ex rel. Farrell v. Sanders*, 897 S.W.2d 125, 126 (Mo. App. E.D. 1995) (*citing State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346 (Mo. banc 1992)). It is not necessary to employ a separate analysis into the propriety of venue on each presented claim where, as here, there is joint liability. *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 721 (Mo. App. E.D. 1994).

Similar holdings are consistent with the general line of cases which discuss the interrelation of the venue statutes and the rules governing joinder of claims. *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671, 673 (Mo. banc 1986) (*citing State ex rel. Farmers Insurance Co., Inc. v. Murphy*, 518 S.W.2d 655 (Mo. banc 1975)). The relationship between the venue statutes and the statutes and rules pertaining to joinder is well established and is applicable when determining venue, even under a special venue statute. *See State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731, 733 (Mo. App. S.D. 1988). The principles developed in this line of cases, therefore, clearly apply with equal validity to an analysis concerning the Plaintiffs' choice between multiple "permissible

venues" under § 355.176.4, where there is common liability among the defendants. Plaintiffs have chosen one of these "permissible venues" enumerated under § 355.176.4, the principal place of business of BJC.

Because a separate analysis of venue as to each defendant properly alleged to be jointly liable is not required, Respondent should have ruled that venue as to BJC made venue good as to joint tortfeasor MBMC. Instead, she retained the cause as to BJC and transferred the claim against jointly liable MBMC to St. Louis County.

It is beyond question that a court has venue over all corporate defendants properly joined if there is venue over any one of them. *State ex rel. Webb v. Satz*, 561 S.W.2d 113, 115 (Mo. banc 1978). Respondent's order transferring the case against MBMC is contrary to longstanding Missouri law as set forth above, and to this Court's holding in *Satz*, 561 S.W.2d at 115, decided under § 508.040. In *Satz*, the corporate (for-profit) Defendants made the same argument advanced by the nonprofit Defendants in this case. In *Satz*, Plaintiffs did not file suit in the county where the cause of action accrued and only one Defendant of several had an office for its business in the Plaintiffs' chosen venue. The Defendants argued that Plaintiffs were required to file in the county where venue was good as to each individual defendant; for example, where the cause of action accrued. *Id*. at 113-14.

This Court, in *Satz*, carefully examined the language of § 508.040, giving meaning to the broad language and plurality of certain words:

We observe that the statute commences in broad terms by stating that "Suits against corporations shall be commenced"; this language refers both to a suit against a single corporation or against several corporations. There is nothing which would in the ordinary understanding of these words limit their application to one or the other and not include both. The statute then . . . goes on to provide that venue will also lie "in any county where such corporations" have certain offices or agents. The words "in any county" are plain enough. What is meant by the next succeeding words, "where such corporations"?

These words refer back to the corporations against which suits can be commenced mentioned at the beginning of the sentence and, as said, this can be either one or more. Accordingly, the meaning is that any county where one or more of the corporations has an office or agent of the specified type is a county where an action against corporations can be commenced. The statute applies, true, when the only defendant is a single corporation, but to declare that it has no application when there are plural defendants, all corporations, is to ignore the broad language with which the statute begins.

Satz, 561 S.W.2d at 115 (emphasis added). The Court in *Satz* readily divined the legislature's intent that venue as to one corporation is venue as to all by its use of the plural, "corporations."

The nonprofit venue statute is no different, as long as it is correctly interpreted. Section 355.176.4 begins, "suits against a nonprofit corporation shall be commenced . . ." (emphasis added). Throughout this section "corporation" is singular. However, the legislature in its wisdom defined "corporation" for us. Section 355.066, "Definitions," provides in pertinent part: "Unless the context otherwise requires or unless otherwise indicated, as used in this chapter the following terms mean: . . . (6) "Corporation," public benefit and mutual corporations." (emphasis added to point out the plural). The nonprofit Defendants effectively argue that the context of the singular "corporation" requires that it not be read to mean the plural, so that the definition of § 355.066(6) does not control. Surely the legislature was mindful of this Court's decision in *Satz* when it instructed readers of Chapter 355 to consider "corporation" in its plural form. The legislature also was aware of the distinction – for purposes of determining venue – between properly joined Defendants and Defendants improperly joined solely to create venue. Thus, wherever the term "corporation" appears, it must be read to mean "corporations."

The Court's analysis, did not address this issue directly in *SSM v. Neill*. The Court concentrated on the presence of the word "only" in § 355.176.4, but did not include the phrase, "[s]uits against a nonprofit corporation." *SSM v. Neill*, 78 S.W.3d at 144. The Court expressly determined that § 355.176.4 governs "suits in which a nonprofit

corporation is sued by itself or with other nonprofit corporate defendants." *Id*. at 143. In addition, the Court held that § 355.176.4 provides the "permissible venues for suits against nonprofit corporations" (plural). *Id*. at 145. The Court also noted that § 508.040 and § 355.176.4 are "similarly worded." *Id*. at 143.

As the Court also held, that when interpreting a statute, the "Court is required to give meaning to every work of the legislative enactment." *SSM v. Neill*, 78 S.W.3d at 144. An interpretation that renders a term "mere surplusage, included for no reason" is disfavored. *Id*. The Court, being mindful of this cannon of statutory interpretation, has already interpreted § 355.176.4 such that its opening phrase "[s]uits against a nonprofit corporation ..." does not limit the statute's effect only to suits against a single nonprofit corporate defendant. The meaning of "a" in the opening phrase cannot, therefore, be limited to the singular and must mean "any one of a great number," and be applicable to more than one individual object. Black's Law Dictionary 1 (6th ed. 1990) (emphasis added). The Court has thus confirmed that, although worded in the singular, the effect of the phrase "[s]uits against a nonprofit corporation" is that it applies to "any" such nonprofit corporation(s), plural.

The nonprofit venue statute's opening language must, then, be read as broadly as that of the corporate venue statute, § 508.040. Any succeeding references to a nonprofit corporation logically and necessarily refer back to any one of the corporations sued, and this can mean "one or more." *Satz*, 561 S.W.2d at 115. A consistent reading of the statute, then, requires that the portion delineating the "permissible venues" (*SSM v. Neill*, 78

S.W.3d at 145), must refer back to any one of the nonprofit corporations sued under the statute. Venue as to one defendant under such as statute, is venue as to all such defendants. *Satz,* 561 S.W.2d at 115.

This interpretation of the statute does not conflict with the court's analysis regarding the work "only." This Court has made plain in *SSM v. Neill*, that the legislature intended in § 355.176.4 to limit the "permissible venues for suits against nonprofit corporations [plural] to only one of the three locations designate in the statute, even when other defendants, including individuals, are also sued." *SSM v. Neill,* 78 S.W.3d at 145 (emphasis added, bracket to point out the plural). The City of St. Louis, here, is one of those locations. Logically, where there are two nonprofit corporations, the same statute would determine venue just as § 508.040 applies to all actions against corporations, unless an individual is also joined. In the latter circumstance, the difference between the Court's holding in *Neill* and its holding in *Satz* is merely that the nonprofit corporate statute controls even if an individual or other nonprofit entity is added. Nowhere in the nonprofit venue statute is there any suggestion that venue must be addressed separately as to each nonprofit defendant. Quite to the contrary, to do so would flout this Court's well-reasoned *Satz* decision, as well as longstanding Missouri law, and would result in internally inconsistent statutory interpretation.

2. Rule 51.045 and § 476.410, RSMo., did not mandate transfer of the case against BJC to St. Louis County.

Relators also assert that the language of Rule 51.045 "in pertinent part" controls the present issue. (Suggestions in Support at 14; Relators' Brief at 26). Relators focus on the language stating that "the entire civil action shall be transferred unless a separate trial has been ordered." *Id*. (emphasis added). The Rule, however, more fully provides that "[i]f a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred. Rule 51.045(b) (emphasis added).

Without addressing the propriety of Respondent's action in severing the present cause on other grounds, Rule 51.045 contemplates the trial court ordering separate trials and transferring only part of the cause of action. To the extent the Rule provides additional discretion to order separate trials, it will prevail over § 476.410. *See State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). The Rule, read fully, appears on its face to provide the trial court discretion to order separate trials, when appropriate, and does not in and of itself provide a basis for issuing the relief requested.

3. Under a statute that provides multiple permissible venues in suits against nonprofit corporations, and under Missouri law of venue and joinder, no "venue rights" are offended under the facts of this case.

Despite the precedent set forth in *Satz*, Relators argue that Plaintiffs must find that one venue where the nonprofit corporations' proverbial moons collide and file suit there. This is exactly the argument made by the defendants in *Satz*, an argument this Court rejected. *Satz*, 561 S.W.2d at 114 ("it is claimed by the . . . defendants . . . that § 508.040,

RSMo. 1969, requires actions against multiple corporate Defendants to be brought either in the county where all such Defendants maintain an office or agent or in the county where the cause of action accrued.")

Further, what evidence exists that § 355.176.4 was intended to frustrate the Plaintiff's ability to select between multiple "permissible venues" authorized under the statute? Plaintiffs are permitted latitude in the choice of the forum both at common law and under the various venue statutes. *State ex rel. Clark v. Gallagher*, 801 S.W.2d 341, 342 (Mo. banc 1990). There is nothing in the wording of § 355.176.4 to suggest that one basis for venue is preferred over another, and there is no hierarchy within the statute and a single basis for venue as to joint tortfeasor BJC is as valid as if all three bases applied. Relators admit that the concept of each defendant in the present case needing to have its own basis for venue is misplaced, and this should end the inquiry. (Relators' Suggestions in Support at 18). Section 355.176.4 is unique among the "special venue statutes" in that it provides multiple bases for venue and is to be distinguished somewhat on that basis from the venue statue considered in *State ex rel. Bell v. St. Louis County*, 879 S.W.2d 718 (Mo. App. E.D. 1994). Again, as in *SSM v. Neill*, however, in *Bell* there was only one defendant subject to the special venue statute at issue. *Bell*, 879 S.W.2d at 718-20.

Although singularity is not the issue here, what of the case in which there is no one venue that satisfies the nonprofit venue statute as to both Defendants? Respondent herself postulated this possibility: "This situation could arise if plaintiff was treated successively at hospitals in Boone County and in the City of St. Louis, there is a single injury caused by the

co-mingled negligence of each, and neither hospital has its registered agent in the County in which the other is located." (Exhibit 2 at 9 n.8). The scenario envisioned by Respondent is quite easy to imagine; a nonprofit hospital in Cape Girardeau County or St. Francois County could negligently treat and then transfer a patient to a subsequent negligent treater in St. Louis. Relators in fact admit, as they must, that one such defendant "will necessarily have to yield to the other. *Barker*, supra, at 734." (Relators' Suggestions in Support at 16, citation in original; *see also* Brief at 28). In such a circumstance, plaintiffs would without question be allowed to choose which venue would apply. *Barker*, 755 S.W.2d at 734; *Bell*, 879 S.W.2d at 719. Under a statute, however, that provides multiple "permissible venues" for each nonprofit corporate defendant, any one of which would suffice against a jointly liable, nonprofit co-defendant, it is not necessary to employ such an exception.

In sum, this Court should follow its decision in *Satz* that venue as to a properly joined defendant under a statute that provides multiple permissible venues is venue as to all such defendants. This Court has already held that § 355.176.4 is not limited to suits against a single, non-profit corporation. *SSM v. Neill*, 78 S.W.3d at 143. A reading which interprets the statute's opening phrase broadly to include "corporations" (plural), but then limits the applicability of the succeeding enumerated bases for venue on a singular basis, corporation by corporation, is internally inconsistent. The reading of § 355.176.4 which the Court's analysis in *Satz* requires, gives consistent meaning to all the statute's words and associated definitions, and harmonizes joinder and venue in a manner not achieved by Respondent's order, nor by Relators' argument in Support of their Petition.

II. RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS AND ANY SEVERED CLAIM IN THIS WRONGFUL DEATH CASE SHOULD REMAIN IN THAT VENUE.

A. Respondent did not act in excess of her jurisdiction under Missouri law.

Plaintiffs have shown that venue here is indeed proper under Missouri law in the City of St. Louis. Relators do not dispute that the principal place of business of BJC is in the City. Neither do Relators dispute Plaintiffs have properly pleaded that BJC and MBMC are joint tortfeasors. Relators, rather, offer a tautological argument that the trial court acted in "excess of its jurisdiction" based on *SSM v. Neill*, 78 S.W.3d at 142 (*citing State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985)). Such an argument assumes "improper venue," which, as shown above, does not apply in the present case because an individual basis for venue is not required and venue lies under § 355.176.4 where BJC has its principal place of business. Relators admit that the concept of each claim needing to have its own basis for venue is misplaced in the present case. (Brief at 31-32).

The cases cited by Relators for the proposition that venue remains a jurisdictional bar to actions by a court of this state include *Kinder* and *State ex rel. Steinhorn v. Forder*, 792 S.W.2d 51 (Mo.App. E.D. 1990) (Suggestions in Support at 11). The *Kinder* case, cited both by this Court in *SSM v. Neill*, 78 S.W.3d at 142, and by the Court of Appeals for the Eastern District in *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 141 (Mo. App. E.D. 2002), for the proposition that venue is jurisdictional, were decided before this Court's holding in *State ex rel. DePaul v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994). In *DePaul*, this Court expressly overruled the "quirk" in Missouri law melding venue and personal jurisdiction. *DePaul*, 870 S.W.2d at 821-22. The primary case cited by the Court in *Kinder*, was *State ex rel. Wasson v. Schroeder*, 646 S.W.2d 105, 106 (Mo. banc 1983). The *Wasson* case was itself expressly overruled on this point by the Court in *DePaul*. *DePaul*, 870 S.W.2d at 822. Likewise, *Steinhorn*, 792 S.W.2d at 53, relies on *State ex rel. Boll v. Weinstein*, 295 S.W.2d 62 (Mo. banc 1965). The *Boll* case was also specifically overruled on by the Court in *DePaul*. *DePaul*, 870 S.W.2d at 822.

This pre *DePaul* concept is not supported under longstanding Missouri law and, if resurrected, where the issue of improper venue is raised, would be a step backward resulting in such difficulties as defective service of process. No Defendant here has ever questioned service of process. Venue is proper in the City of St. Louis and there are no jurisdictional barriers thereto. To the extent post *DePaul* cases hold otherwise, the Court should follow longstanding Missouri law consistent with its clear holding in *DePaul*.

B. Respondent erred in splitting Plaintiffs' indivisible cause of action and transferring the severed claims against a jointly liable tortfeasor.

Plaintiffs and Relators are apparently in agreement that Missouri public policy and law require that this cause of action be tried in a single trial. (Relators' Suggestions in Support at 19; Brief at 321). Likewise, Relators agree that Respondent should not have disregarded Plaintiffs' allegations of joint liability. *Id*. Plaintiffs – even if they desired – could not split their cause of action. Respondent's order requires an indivisible wrongful death cause of action to be divided; the part of the death caused by BJC will be tried in the City of St. Louis, while a St. Louis County jury will be empaneled to decide what part of Mrs. Trimble's death was caused by MBMC.

Death is one injury, caused in this case by the multiple concurrent acts of negligence of BJC and Missouri Baptist. The cause of action cannot be split. Missouri's wrongful death statute, § 537.080 *et seq.*, provides for only "one indivisible claim for the death of a person which accrues on the date of death." *State ex rel. Kansas City Stockyards Co. of Maine v. Clark*, 536 S.W.2d 142, 145 (Mo. banc 1976). A claimant may not split a cause of action and try a single claim piecemeal against defendants one by one. *State ex rel. Todd v. Romines*, 806 S.W.2d 690, 691 (Mo. App. E.D. 1991). The test for determining whether a claim has been improperly split is whether the cause of action against both Defendants arises out of the same events and the parties, subject matter and evidence necessary to sustain the claims against each are the same. *Hagen v. Rapid American Corp.*, 791 S.W.2d 452, 455 (Mo. App. E.D. 1990).

Here, the party Plaintiffs would be the same in both cases. These Plaintiffs represent all persons entitled to recover for the death of Hazel Trimble, since they are the surviving spouse and children the decedent left behind. They are "Class I" beneficiaries, and therefore recover to the exclusion of all others. Section 537.080.1, RSMo. 1991 The party Defendants, under Respondent's order, would be different in the City and the County actions, but Plaintiffs have properly alleged they are joint tortfeasors and each is, therefore, required as a defendant in Relators' cause of action. *Todd*, 806 S.W.2d at 691.

If the rule against splitting a cause of action has any teeth, a party Plaintiff clearly may not be <u>forced</u> to split his or her cause of action. This is particularly true in a wrongful death case. Any settlements in a death case must be approved by the court, and here two different judges may be asked to approve a settlement and enter judgment. Likewise, if both cases proceed to trial, different juries would be faced with the same task, i.e., deciding the loss of any particular family member has suffered. A jury in St. Louis County might find the damages to be dramatically different than those determined by the St. Louis City jury. Two separate awards over the same death would be undesirable and probably unprecedented.

Plaintiffs' proper allegations of joint liability, however, <u>must</u> be considered in determining the contingent question of venue. *Allen*, 581 S.W.2d at 825. Plaintiffs' allegations of joint liability are the "touchstone" for determining when venue may be predicated on bases provided by a co-defendant, *Farrell*, 897 S.W.2d at 126 (*citing Jinkerson*, 826 S.W.2d 346), and mandate that venue is proper for the entire case in the

City of St. Louis. Relators' Petition, which requests this Court's Order to transfer the case to St. Louis County, should, therefore, be denied.

CONCLUSION

Respondent did not err in refusing to transfer the case against BJC to St. Louis County. There is no dispute that BJC, which Plaintiffs' have properly alleged to be a jointly liable tortfeasor, has its principal place of business in the City of St. Louis. This is one of the permissible venues for suits against nonprofit corporations under § 355.176.4 and *SSM v. Neill*, 78 S.W.3d at 141, 143. The contingent question of venue, however, must be resolved, not only under the venue statutes but also under the rules relating to the propriety of joinder of defendants. *Allen*, 581 S.W.2d at 825. Common or joint liability is the touchstone for this determination, *Farrell*, 897 S.W.2d at 126, and these principles apply in a determination under a special venue statute. *Barker* 755 S.W.2d at 733.

Rule 51.045 and § 476.410, in and of themselves, do not mandate the relief sought by Relators' herein. Further, there is no jurisdictional bar to venue in the City of St. Louis under longstanding Missouri law as clearly articulated by this Court in *DePaul*, 870 S.W.2d at 821-22. Relators agree with Plaintiffs, however, that Respondents' Order splitting the indivisible wrongful death cause of action cannot stand. Relators further agree that Plaintiffs have properly alleged joint liability between BJC and MBMC. Plaintiffs' allegations of joint liability cannot be ignored and Relators even agree that the concept of each defendant needing to have its own basis for venue is misplaced in the analysis of the present case. Venue is, therefore, proper for this entire case in the City of St. Louis.

Relators' Petition requesting this Court's Order in Mandamus or Prohibition to transfer the case to St. Louis County should be expeditiously denied.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

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CERTIFICATE OF SERVICE

I hereby certify two copies of the foregoing were served upon the parties hereto by hand delivery on this 20th day of June, 2003, to:

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Relator Herein

The Honorable Margaret M. Neill,
Missouri Circuit Court, 22d Judicial Circuit,
Civil Courts Bldg., Floor 6 SW
10 N. Tucker Blvd.,
St. Louis, MO 63101
Respondent herein

Courtesy Copy to:
The Honorable Michael P. David
10 N. Tucker Blvd., Floor 4 SW
St. Louis, MO 63101

RULE NO. 84.06(b) and (g) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 5733 words according to the word count of Corel Word Perfect Version 9.

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